No. 22,572 and 22,572A

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,572

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

RAYTHEON COMPANY, Respondent

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No. 22,572A

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

and

RAYTHEON COMPANY, Intervenor

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ON PETITION FOR ENFORCEMENT AND ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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and

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## ISSUES PRESENTED

I. Whether substantial evidence on the whole record supports the Board's findings that the Company violated Section 8(a)(1) of the Act.

II. Whether the Board properly refused, in view of the General Counsel's objection, to allow the charging party union to expand the scope of the litigation before the Board.

## JURISDICTION

This case is before the Court on the petition of the National Labor Relations Board for enforcement of its order issued against Raytheon Company on October 5, 1966 (Case No. 22,572), and on the petition to review filed by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (Case No. 22,572A), pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29

U.S.C., Sec. 151, *et seq.*).[1] The Board's Decision and Order (R. 41-44, 18-27)[2] are reported at 160 NLRB 1603. This Court has jurisdiction, the unfair labor practices having occurred at Mountain View, California, where the Company is engaged in the manufacture of electronic components.

## STATEMENT OF THE CASE

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background of events

In the fall of 1964, two unions[3] initiated organizing drives seeking to represent the Company's production and maintenance employees. The ensuing representation election, which the unions lost, was conducted on February 4, 1965. Protesting that the Company's pre-election conduct was violative of the Act and had improperly affected the election results, the International Union of Electrical, Radio and Machine Workers, AFL-CIO (herein the Union) filed objections to the election, as well as unfair labor practice charges with the Board (G.C. Exh. 1(a) and 2(d)). Only the unfair labor practices are at issue in the instant proceeding.

#### B. The Company's preelection campaign

During the week immediately preceding the February 4 election, employee Carol Alvarado was twice called to the desk of her supervisor, Nic-

[1] The pertinent statutory provisions are reprinted in the Appendix, *infra*, p. 24.

[2] References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's Exhibits and to the Company's Exhibits are designated "G.C. Exh." and "Resp. Exh.," respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] International Union of Electrical, Radio and Machine Workers, AFL-CIO, and International Brotherhood of Electrical Workers, AFL-CIO.

ola Krest, and questioned concerning her union activities (R. 19; Tr. 24-28). On the first occasion, Alvarado, who was the only employee in her department to wear a union badge, was asked why she wanted a union (R. 19; Tr. 26, 28). She replied that the employees "could use a better vacation plan and sick leave and possibly higher wages" (R. 3, 19; Tr. 26). Krest responded that "these things were all impossible to get . . . that the Union officers were a bunch of crooks and that they lived very expensively in the best of homes, drove very expensive cars. . ." which were paid for out of union dues (R. 2, 19; Tr. 26-27). Alvarado was then reminded that "us girls didn't really realize how lucky we had it, how well off we were, that he never complained about us—about our work standards. He had never really set any standards and that he never complained about us girls coming in late and about us going to the bathroom for a cigarette . . . [b]ut, he said that if the Union came in all of that would be changed of course, that standards would be set and that we would have a certain length of time to meet them; and, if not, well, that we would be out" (R. 19; Tr. 27). Krest continued, "that this thing of coming in late—we would have three different times that we could do that and the fourth time we would be fired" (R. 19-20; Tr. 27). Two or three days later, Krest again called Alvarado to his desk and informed her that he had heard she had been to a union meeting. Krest wanted to know why she had gone, and stated she did not know what she "wanted or what [she] was doing" (R. 20; Tr. 28).

The Union filed its petition for a representation election on January 4, 1965 (G.C. Exh. 2(a)). On January 14, 1965, the Company wrote its employees "to make known its position in this election" (G.C. Exh. 5). The employees were told in the letter "that a union would [not] be of

any benefit, but rather would be a real interference in the relationship between the Company and its employees for several reasons" (*ibid.*). For example, the Company warned, "A union cannot guarantee any increased wages or benefits. When a union comes into a plant, collective bargaining begins not at the present wage level, but at *zero.* Strike is the Union's only weapon if it seeks more than the Company can pay" (emphasis in original) (*ibid.*).

In furtherance of this campaign, both the Chairman of the Board and the President of the Company decided that Robert Hennemuth, Vice President for Industrial Relations, should be sent from the Company's Massachusetts headquarters to "have a chat with the employees" (Resp. Exh. 3, p. 1). Accordingly, on February 2, just two days before the election, Hennemuth gave a prepared "captive audience speech" to seven separate groups of its employees.[4] Hennemuth spoke from an outline which was organized according to four major points (R. 3, 20; G.C. Exh. 11).

Throughout these speeches Hennemuth stressed that ". . . in a negotiation they [the employees] had to understand that legally the Company and the Union start from scratch . . . what happens in negotiations is that two parties sit down to negotiate and they start fresh—just as though nothing's on the table . . . in negotiations they have to get up to where you are—where the Company is, first—before you even get any more" (R. 21; R. Exh. 5, pp. 12-13). And, "the whole wage policy and program is something that would be open to negotiation if a union, perish the thought, did come in. . . . [N]egotiations [don't] start from where the benefits

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[4] All speeches were similar in context except as to the ensuing question and answer period. The speeches, in substantial part, were tape recorded and transcriptions thereof were introduced into evidence (R. Exh. 3-9).

are . . . you start from scratch (Resp. Exh. 8, p. 14; Tr. 48, 79, 109, 131, 142, 170).

Hennemuth further emphasized this by pointing out to the employees that if the Union won the election and negotiations ensued the employees might lose some of their existing benefits. As an example, the employees were told that "it is entirely legal and possible for any employer . . . to take the position in negotiations of, we have, say, nine paid holidays now, we're sick and tired of this expense, we're not going to from this point on agree to any more than five" (R. 21; Resp. Exh. 6, p. 9, Tr. 271). Hennemuth also added that employee insurance was now free, but "if the Union should come in, that this would have to be negotiated from scratch and that we might possibly end up having to pay for what we were now getting free" (R. 21; Tr. 31, 79-80, 142). Hennemuth also related the story of a company which gave bus fares to its employees, but "when the union did come into the plant, the company took away the bus fare" (R. 21; Tr. 79-80). Finally, the employees were told that they should not be "misled", for the "things that were in effect at that time would not necessarily be in effect upon acceptance of the Union" (R. 21; Tr. 142).

Throughout the preelection campaign, the employees were also told that the selection of a union would be a useless act. Thus, one Company leaflet stated "No union can guarantee anything which a company is not willing or able to give" (G.C. Exh. 9), and in a second leaflet, issued just prior to the election, "no union could have obtained more for you than your company has already granted voluntarily, *and the same holds true for the future*" (emphasis in original) (G.C. Exh. 11). This theme was reiterated in the Hennemuth speeches. The employees "should bear in mind that a union cannot guarantee you anything. Now I'm telling you, if a union

wins the right . . . to represent the employees involved, a period of negotiation must follow after that point and there comes into being between the union and the company after that only what the company wants to agree to . . ." (R. 21; R. Exh. 3, p. 4). In short, the employees were told that they could not get anything because of the Union that they would not otherwise get from the Company (R. 21; Resp. Exh. 3, p. 9; 7, p. 3; 8, pp. 4, 10; Tr. 153, 177). Thus, in reference to the employees' questions about paid sick leave, Hennemuth stated "So bear in mind, that even if a union does come on these premises as a result of Thursday (election day), that does not mean any such union will get paid sick leave. And I'm saying to you right now, it won't" (R. 22; Resp. Exh. 9, p. 6; 3, p. 15; 4, p. 9; 6, p. 3; 8, p. 7).

In these same speeches, Hennemuth announced the institution of an improved grievance procedure. Henceforth, if the employees were dissatisfied with the resolution of complaints and grievances on the plant level, they could appeal directly to the Company's Industrial Relations Department in Massachusetts (Resp. Exh. 4, p. 13) or write directly to Hennemuth at the Industrial Relations Office (Resp. Exh. 3, pp. 11, 20; 4, pp. 3-4; 5, pp. 9, 15; 6, pp. 5-6; Tr. 81-82, 110-111, 179).

## II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees as to their union activities; threatening that the employees would suffer a loss of existing benefits in the event they chose union representation; and promising an improved grievance procedure as an inducement to employees not to engage in union activity (R. 41-42, 18-26). The Board's order requires

the Company to cease and desist from the unfair labor practices found and to post the customary notice (R. 42-43, 26-28).

## ARGUMENT

### I.

### SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT

#### A. Coercive interrogation and threats to impose more onerous working standards

In the week preceding the election of February 4, employee Carol Alvarado was twice called to the desk of her departmental supervisor, Nicola Krest, and questioned as to the reasons for her union activities.[5] Alvarado replied that the employees could use a better vacation plan, sick leave and higher wages. Responding, Krest stated "these things were all impossible to get," indeed, the employees were "well off" under existing conditions and that he had never complained about their work standards, tardiness, or use of the bathroom for a cigarette (Tr. 27). Krest then made it clear that all this would change "if the Union came in," that work standards would be set and if the employees failed to meet them they "would be out" (*ibid.*). Krest further warned that continued tardiness would result in discharge of the offending employee. The law is well settled that such interrogation of employees concerning union activities, when coupled, as it was here, with threats to impose more onerous work standards and plant rules in the event the employees should select a union as their collective-bargaining representative violates Section 8(a)(1) of the Act. While

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[5]Significantly, Alvarado was the only employee in her department to wear a button publicizing her allegiance to the Union (*supra*, p. 3).

the enactment or promulgation of stricter work standards and rules of plant discipline is ordinarily within management's control, the threat to impose such standards if the employees should choose the union is proscribed by the Act. *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F.2d 92, 93 (C.A. 9); *N.L.R.B. v. Plaskolite, Inc.*, 309 F.2d 788, 789 (C.A. 6); *N.L.R.B. v. Swan Fastener Corp.*, 199 F.2d 935, 937-939 (C.A. 1); and see *Bon Hennings Logging Co. v. N.L.R.B.*, 308 F.2d 548, 552-553 (C.A. 9); *N.L.R.B. v. McCatron*, 216 F.2d 212, 215-216 (C.A. 9), cert. denied, 348 U.S. 943.

### B. Threats of reprisal: the February 2 captive audience speeches

In seeking to thwart the threatened advent of the Union, the Company relied heavily on an extensive anti-union propaganda campaign, a campaign which culminated with a series of captive audience speeches delivered by the Company's Vice President for Industrial Relations, Robert Hennemuth, two days before the election.[6] Relying on the credited testimony of various employees and transcriptions made from the tape recordings of the various speeches (R. Exh. 3-9), the Board concluded that these speeches

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[6] In the earlier stages of this campaign the employees received various letters from the Company designed to persuade the employees to reject the Union (see *e.g.*, G.C. Exh. 4-13). Thus, on December 10, 1964, the employees were told that a union would cost them $50,000 out of their pockets but would not "provide a single bit of business to sustain employment" (G.C. Exh. 4). At other times, the employees were told of strikes that had occurred at other companies when negotiations with the same union had broken down (G.C. Exh. 6-7), and that "[w]hen you come right down to it, a union can't do anything for you . . . but it can do something *TO* you. . . . Only you and your company can provide [higher wages or fringe benefits]. A Union May Make A Lot Of Promises, But A Company Must Make All The Decisions, Except One. That one is the union's *decision to strike* in the event they cannot fulfill their wild campaign promises through negotiations" (Emphasis in original) (G.C. Exh. 10).

constituted "poorly concealed threats to deprive respondent's employees of any and all benefits to be derived from the exercise of the right to collective bargaining through representatives of their own choosing" (R. 23). Before the Board, the Company did not dispute the facts as found by the Board, but rather contended that the speeches were protected by Section 8(c) of the act, as expressions of the Company's "views, arguments or opinion" about the consequences and desirability of unionism.[7] The Board rejected this contention, because Section 8(c) expressly excludes "threat[s] of reprisal or force or promise of benefit." It is submitted, as we now show, that the Board's determination is amply supported by the record, and under the applicable standards of review is entitled to affirmance by this Court.

In determining the propriety of preelection speeches and whether Section 8(a)(1) of the Act has been violated, the law is clear that the "function of drawing the rather nebulous line between permissible persuasion and prohibited coercive conduct lies within the special competence of the Board. . . ." *N.L.R.B. v. Brown-Dunkin Co.*, 287 F.2d 17, 18 (C.A. 10). Accord: *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 811 (C.A. 4), cert. denied, 382 U.S. 831; *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 760 (C.A. 6); see also *N.L.R.B. v. McCatron*, 216 F.2d 212, 216 (C.A. 9), cert. denied, 348 U.S. 943. Furthermore, "in considering whether such statements or expressions are protected by Section 8(c) of the Act, they cannot be considered as isolated words cut off from the relevant circumstances and background in which they are spoken." *N.L.R.B. v. Wagner*

[7] Section 8(c) provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

*Iron Works*, 220 F.2d 126, 139 (C.A. 7), cert. denied, 350 U.S. 981. Accord: *N.L.R.B. v. Globe Wireless, Ltd.*, 193 F.2d 748, 751-752 (C.A. 9). As Judge Learned Hand observed in *N.L.R.B. v. The Federbush Co.*, 121 F.2d 954, 957 (C.A. 2):

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation of the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

As set forth in the Statement, Robert Hennemuth made a series of eight captive audience speeches on February 2.[8] To indicate the official nature of his visit, Hennemuth told the employees that the Company's chairman of the Board and the President had decided that he should "go ahead out and please have a chat with the employees who are going to be voting" (R. Exh. 3, p. 1).[9] Hennemuth also told the employees that his job with the Company was to handle labor relations, to deal with "labor union kinds of problems" (R. Exh. 3, p. 2).

Throughout the February 2 speeches, Hennemuth reminded the employees that if they voted to be represented by a union, a period of nego-

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[8]Substantial portions of seven of the speeches and the ensuing question and answer period are reproduced as Respondent's Exhibits 3-9. The eighth speech, delivered to handicapped workers (deaf mutes) was not recorded (Tr. 244). Portions of the first, second, third, fourth, and seventh speeches were not recorded in their entirety as the tape recorder was not turned on at the beginning or ran out before the end of the speech (R. 20; Tr. 245-246).

[9]The Company's headquarters are located in Lexington, Massachusetts.

tiations would then ensue. In these negotiations "legally the Company and the Union start from scratch . . . just as though nothing's on the table . . . they (the Union) have to get up to where you are—where the Company is first—before you even get any more." As a result, "the whole wage policy and program . . . would be open to negotiations if a union, perish the thought, did come in" (Resp. Exh. 8, p. 14; Tr. 48, 79, 109, 131, 142, 170). For example, Hennemuth pointed out, the employees' insurance was now paid for by the Company, but "if the Union should come in, that this would have to be negotiated and that we (the employees) might possibly end up having to pay for what we were now getting free" (Tr. 31, 79-80, 142). Emphasizing the point that a loss of benefits might result if the employees selected a union to represent them, Hennemuth related the story of a company which had given bus fares to its employees but "when the union did come into the plant, the company took away the bus fare" (Tr. 79-80).

In sum, Hennemuth, speaking for the Company, clearly conveyed the message that in the event the employees chose the Union, then they would run a substantial risk of losing some of their existing fringe benefits in the ensuing negotiations. The threat of this loss was not related to any financial or economic predicament that the Company might be experiencing, but rather the determinative factor would be the existence of the Union as the employees' collective-bargaining representative. Only if the Union was present would the employees be subjected to the risk of a loss of their existing fringe benefits. It is submitted that the coercive nature of the foregoing statements is clear and that the Board was fully warranted in finding that they violated Section 8(a)(1) of the Act. *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 761 (C.A. 6); and see *N.L.R.B. v. Marsh Super-*

*markets, Inc.*, 327 F.2d 109, 111 (C.A. 7), cert. denied, 377 U.S. 944. Accord: *Federal Envelope Co.*, 147 NLRB 1030, 1040; *Stuttgart Shoe Corp.*, 149 NLRB 663, 669.[10]

In concluding that Hennemuth's speeches overstepped the "rather nebulous line between permissible persuasion and prohibited coercive conduct," *N.L.R.B. v. Brown-Dunkin Co., supra,* 287 F.2d at 18, the Board was fully cognizant that Section 8(c) of the Act protects "the expressing of any views, argument or opinion . . . [so long as] such expression contains no threat of reprisal or force or promise of benefit." Before the Board, the Company contended that since its statements were carefully couched in terms of predictions as to the possible economic consequences which would result if the Union were selected by the employees, they cannot be found to constitute a "threat of reprisal" and, therefore, Section 8(c) of the Act applies. It is submitted, however, that the existence of a threat of reprisal cannot depend solely on whether the employer was subtle enough to use words of probability or possibility rather than of certainty. A statement that an employer may take certain action which would affect the economic well being of his employees may still constitute a threat. Indeed, an employee, unsure of the consequences of a vote for

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[10]In the course of his speeches, Hennemuth also promised the employees an improved grievance procedure. Henceforth, the employees, if dissatisfied with the resolution of grievances at the plant level, could appeal directly to Hennemuth or the Company's Industrial Relations Department. Such change in procedure clearly constituted a benefit to those employees who felt that their complaints were not being given adequate attention, and, we submit, violated Section 8(a)(1) of the Act. "[I]nterference accomplished by allurements are as much condemned by the Act as is coercion." *N.L.R.B. v. Douglas & Lomason Co.*, 333 F.2d 510, 514 (C.A. 8). See also, *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409-410; *S & H Grossinger's, Inc.*, 156 NLRB 233, 234, enforced 372 F.2d 26 (C.A. 2).

the Union, would be most reluctant to run the risk that his employer was only bluffing.[11]

For these reasons, the law has developed that "an employer's prediction of untoward economic events may constitute an illegal threat if he has it within his power to make the prediction come true." *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B.*, 289 F.2d 757, 763 (C.A. D.C.). Or, as conversely stated, "In order not to be a threat, a prediction must relate to an event over which the speaker has no control." *N.L.R.B. v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 901*, 314 F.2d 792, 794 (C.A. 1). Accord: *N.L.R.B. v. Nabors*, 196 F.2d 272, 276 (C.A. 5), cert. denied, 344 U.S. 865; *N.L.R.B. v. Louisiana Mfg. Co.*, 374 F.2d 696, 702-703 (C.A. 8); cf. *N.L.R.B. v. Geigy Co.*, 211 F.2d 533, 557 (C.A. 9), cert. denied, 348 U.S. 821. In the instant case, there can be no doubt that the statements found by the Board to constitute threats, related to matters well within the Company's power to control. Thus, if the Union was selected by the employees and negotiations ensued, the Company in its position as a bargaining party could have insisted that all existing fringe benefits be renegotiated from scratch. Indeed, throughout the Hennemuth speeches, it was made trans-

[11] The coercive impact of Hennemuth's February 2 speech is all the more destructive of the rights of employees because it was made by a high-ranking official flown in from Massachusetts for the express purpose of talking about unionization. This is particularly true when the employees are directed to assemble on company time and on company premises. See, staff of Subcomm. on National Labor Relations Board, House Comm. on Education and Labor, "Administration of the Labor-Management Relations Act by the N.L.R.B." p. 58 (87 Cong., 1st Sess., Comm. Print 1961); *N.L.R.B. v. United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2), cert. denied, 376 U.S. 951; Note, 61 Yale L. J. 1066, 1074-1076 (1952); Note, 14 U. Chi. L. Rev. 104, 108-110 (1946); Bok, "*The Regulation of Campaign Tactics in Representation Elections Under the N.L.R.A.*," 78 Harv. L. Rev. 38, 100-103.

parently clear to the employees that the Company did have the power and ability to make its predictions come true. The employees were repeatedly told in no uncertain terms that if the Union wins, "a period of negotiations must follow after that point and there comes into being between the union and the company after that only what the company wants to agree to. . . ."[12] And in reference to the employees' evident interest in paid sick leave, Hennemuth stated, "even if a union does come on these premises as a result of Thursday (election day), that does not mean any such union will get paid sick leave. And, I'm saying to you right now, it won't" (R. 22; Resp. Exh. 9, p. 6; 3, p. 15; 4, p. 9; 6, p. 3; 8, p. 7) In sum, the Company's predictions do not refer to untoward economic consequences which might result from decisions made by third parties. Rather, the power to transform the predictions into actualities was, as the Company was quick to point out, at all times within the control of the employer. The speeches clearly conveyed the message that a consequence of the selection of the Union would be the discontinuance of existing benefits and a "start from scratch," the coercive nature of which was plain and, accordingly, in violation of Section 8(a)(1) of the Act. *Surprenant Manufacturing Co. v. N.L.R.B.;* 341 F.2d 756, 761 and cases cited *supra,* pp. 11-12. Moreover, although all employee benefits would have been subjected to good-faith bargaining if the Union had won the February 4 election, the Company was not justified in "making the anticipated events the subject of threats . . . to force the abandonment of the Union by the

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[12]This same theme was advanced in earlier company propaganda leaflets: "No union can guarantee anything which a company is not willing or able to give" (G.C. Exh. 9), and, "no union could have obtained more for you than your company has already granted voluntarily, *and the same holds true for the future*" (emphasis in original) (G.C. Exh. 11).

employees." *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B. v. Miller*, 341 F.2d 870, 872-873 (C.A. 2); *Daniel Construction Co. v. N.L.R.B., supra*, 341 F.2d at 810-811; *Surprenant Mfg. Co. v. N.L.R.B., supra*, 341 F.2d at 760-761.

Finally, it is anticipated that the Company will seek to rely on this Court's recent decision in *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753. However, in *TRW*, the Company had stated that it would be necessary to "begin from scratch and bargain hard to protect our competitive position" *Id.* at 758. In contrast, here the Company never offered an economic justification for its asserted bargaining policy. Rather, the repeated statements by the Company as to its bargaining position were tied solely to the fact of union representation. Moreover, in contrast to *TRW*, the instant statements constantly stressed the power that the Company had to make its predictions come true.[13] On the basis of the foregoing, we submit that *TRW* does not control the instant case.[14]

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[13]The Company's continuing emphasis on the "control" factor only served to sharpen the clarity of its threats. Moreover, in a situation such as that presented in *TRW* the employer may assert that it will have to bargain hard in order to protect its "competitive position" but the union can seek to allay fears of the employees by assuring them that while seeking improvements it will not force the company into insolvency. But here, the Company never advanced any basis for its statements (compare *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B.*, 289 F.2d 757, 763 (C.A. D.C.)), and the Union was, accordingly, unable to respond. From the employees' point of view the Company's statements were tied solely to the advent of the Union.

[14]In its answer to the petition for enforcement, the Company contends that these proceedings are now moot. But as the Supreme Court has pointed out, ". . . compliance with an order of the Board does not render the case moot, . . . A Board order imposes a continuing obligation, and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree." *N.L.R.B. v. Mexia Textile Mills*, 339 U.S. 563, 567; *N.L.R.B. v. Rippee*, 339 F.2d 315, 316 (C.A. 9).

## II.

### THE BOARD PROPERLY REFUSED, IN VIEW OF THE GENERAL COUNSEL'S OBJECTION, TO ALLOW THE CHARGING PARTY UNION TO EXPAND THE SCOPE OF THE LITIGATION BEFORE THE BOARD

During the hearing in this case, the Union filed a motion designed to expand the scope of the litigation before the Board by adding new unfair labor practice allegations to the General Counsel's complaint. Based upon the General Counsel's opposition, the Trial Examiner denied the motions and the Board affirmed. The Union alleges this as error because the Board, it claims, has discretion to allow amendments over the General Counsel's objection. But this Court has already considered and rejected such a contention: "... it is well established that the Board is not empowered to allow amendments to the complaint which the General Counsel has rejected.. These are amendments proposed by other parties than the General Counsel and were it possible for them to impose amendments to the complaint, the final authority of the General Counsel to issue complaints would be circumvented. The authority to issue complaints is authority to determine what they shall contain." *Frito Co. v. N.L.R.B.*, 330 F.2d 458, 464.

The decisions of other courts are in accord with this view that the Board is without power to permit amendments to the complaint which the General Counsel has rejected. *Wellington Mill Division, West Point Mfg. Co. v. N.L.R.B.*, 330 F.2d 579, 590 (C.A. 4), cert. denied, 379 U.S. 882 ("the decision as to the *scope* of a complaint is for the General Counsel"); *International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, 289 F.2d 757, 762 ("the Board cannot entertain an amendment to the complaint which the general counsel opposes . . ."); *Piasecki Aircraft Corp.*

*v. N.L.R.B.*, 280 F.2d 575, 588 (C.A. 3), cert. denied, 364 U.S. 933 ("the Board was within its province in according determination of the scope of the complaint to the General Counsel . . ."); *N.L.R.B. v. Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (C.A. 5) (". . . failure of the general counsel to process these complaints cannot be reviewed or set aside by the Board").

On the strength of the foregoing alone, it would be appropriate, we submit, for the Court to reject the Union's claim of error. However, in view of the Union's lengthy argument that these cases rest on an erroneous interpretation of the Act and that more recent decisions require an alteration of settled law, we shall respond to these contentions.

The refusal by the Board to amend the complaint over the General Counsel's objection rests, of course, upon the language and legislative history of Section 3(d) of the Act. That section provides that "the General Counsel of the Board . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board. . . ." It is clear that Congress intended by this provision to effect a separation of the functions of prosecution and adjudication. As the courts have pointed out, the General Counsel was to investigate charges, issue complaints and prosecute them before the Board, much like a district attorney in criminal cases, without being subject to Board review in his performance of such prosecutory functions. The Board was only to decide cases and supervise elections. *International Union of Electrical, Radio & Machine Workers v. N.L.R.B., supra; Haleston Drug Stores, Inc. v. N.L.R.B.*, 187 F.2d 418, 421 (C.A. 9), cert. denied,

342 U.S. 815, H. Conf. Rep. No. 510, on H.R. 3020, 80th Cong., 1st Sess., p. 37, I Leg. Hist. (1947), 541.[15]

In a long and unbroken line of decisions, this statutory provision has been interpreted to preclude Board and court review of the General Counsel's decision not to proceed on a charge of unfair labor practices.[16] As the Supreme Court recently stated, "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca v. Sipes, supra,* 386 U.S. at 182.

An amendment of a complaint at the instance of the charging party, therefore, without the consent of the General Counsel, would be wholly inconsistent with the statutory scheme. The General Counsel would hardly have final authority "in respect of the investigation of charges and issuance of complaints" if the charging party could request the Board to consider charges the General Counsel had rejected. Likewise, the General Counsel would hardly have final authority with respect to "the prosecution of . . . complaints before the Board" if the Board could direct that

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[15] "Leg. Hist." refers to the two-volume publication, *Legislative History of the Labor Management Relations Act, 1947* (G.P.O., 1948).

[16] *Vaca v. Sipes,* 386 U.S. 171, 182; *Dunn v. Retail Clerks, Local 1529,* 307 F.2d 285 (C.A. 6); *Thompson Products, Inc. v. N.L.R.B.,* 133 F.2d 637, 639-640 (C.A. 6); *Balanyi v. Local 1031, I.B.E.W. & N.L.R.B.,* 374 F.2d 723 (C.A. 7); *United Electrical Contractor Ass'n v. Ordman,* 366 F.2d 776 (C.A. 2), cert. denied, 385 U.S. 1026; *Division 1267, Amalg, Ass'n, etc. v. Ordman,* 320 F.2d 729 (C.A.D.C.); *N.L.R.B. v. Lewis,* 310 F.2d 364, 366 (C.A. 7); *Retail Store Employees Union Local 954 v. Rothman,* 298 F.2d 330 (C.A.D.C.); *Bandlow v. Rothman,* 278 F.2d 866 (C.A.D.C.), cert. denied, 364 U.S. 909; *Contractors Ass'n of Philadelphia, et al. v. N.L.R.B.,* 295 F.2d 526 (C.A. 3), cert. denied, 369 U.S. 813; *Hourihan v. N.L.R.B.,* 201 F.2d 187, 188 (C.A.D.C.), cert. denied, 345 U.S. 930; *General Drivers, etc. v. N.L.R.B.,* 179 F.2d 492, 494 (C.A. 10); *Lincourt v. N.L.R.B.,* 170 F.2d 306, 307 (C.A. 1); *Jacobsen v. N.L.R.B.,* 120 F.2d 96, 99-100 (C.A. 3).

complaints be expanded to include matters he has excluded. Indeed, if the Board were permitted to put into a complaint what the General Counsel would omit, the General Counsel's powers to frame a complaint would be nullified.

To avoid the force of this analysis, the Union attempts to distinguish between the *issuance* of complaints and the *amendment* of complaints. This choice of terminology cannot obfuscate the facts: what the Union seeks here is to compel Board consideration of a charge involving facts and issues not being prosecuted by the General Counsel. The Union concedes (Br. p. 11) that the General Counsel has "final authority over the issuance of complaints." It would make little sense, therefore, to allow a charging party to seek an addition to a complaint already issued when, admittedly, such additional matters could not be brought before the Board if they stood alone. The same considerations involved in the initial decision to issue a complaint are involved when the decision to expand its allegations are confronted: e.g., reliability of witnesses, applicability of legal precedent, possibilities of settlement, the importance of the challenged conduct, etc.

It is true, as the Union points out, that Congress did not amend Section 10(b) of the Act when it added Section 3(d) in 1947, and Section 10(b) does contain a provision which allows the Board to amend any complaint "in its discretion" at any time prior to the issuance of an order. According to the Union, this provision of Section 10(b) proves its case.

But the Union misreads Section 10(b) and this Court's decision in *Frito Co. v. N.L.R.B., supra.* In *Frito,* this Court interpreted Section 10(b) as permitting the Board to amend the compalint to conform to

proof admitted without objection by the General Counsel (330 F.2d at 465). In such circumstances, as was pointed out, "[a] ruling by the Board adverse to the wishes of the General Counsel is not a review of a decision of the General Counsel. In the prosecution of the complaint he could have objected to the introduction of the evidence. He did not do so and he thereby consented to the introduction of the issue to which the evidence was addressed. The trial examiner and the Board were then free to consider the evidence and to exercise judicial discretion as to whether to permit amendment to conform to proof" (*ibid.*). But nothing in the Court's decision supports the Union's instant contention that the trial examiner or the Board may permit an amendment to the complaint over the objection of the General Counsel. Indeed, the Court stated that where the General Counsel did object, the Board was without power to amend the complaint (*id.* at 464).

Likewise, in *International Union of Electrical, Radio & Machine Workers v. N.L.R.B., supra,* the Court of Appeals for the District of Columbia Circuit was faced with the contention that, despite the clear language of Section 3(d) granting final authority to the General Counsel, Section 10(b) permitted amendments. Consistent with the separation of functions intended by Congress, the court found, Sections 10(b) and 3(d) could be reconciled (289 F.2d at 761):

> Section 10(b) may be read, for example, to empower the Board to disallow amendments to the complaint, requested or approved by the general counsel, in order to prevent surprise and prejudice to the charged party.

Nor is there anything in more recent decisions to warrant a departure from the rule long recognized by this and other courts.[17] The Union reads *Int'l Union, United Auto Workers v. Scofield*, 382 U.S. 205, as a decision which undercuts the entire basis for the rule. But this reading will not withstand analysis. In *Scofield* (and its companion case, *Fafnir Bearing Co.*), the issue was "whether parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings." 382 U.S. at 207. Unlike the issue in the case at bar, where the Board's position rests upon the explicit terms of the Act, the question posed in *Scofield* was one as to which the Act was "silent." 382 U.S. at 209. Accordingly, in upholding a private party's right of intervention, the Supreme Court plainly intended no expansion of rights with respect to other problems to which Congress had already spoken.

Moreover, the criteria considered by the Supreme Court as relevant to resolving the intervention problem are, by and large, wholly irrelevant to any claim that a charging party may be entitled to enlarge Board litigation over the General Counsel's objection. Thus, the Supreme Court focussed upon the importance of avoiding duplication of judicial proceedings, "circuit shopping," and needless delay. And it explicitly acknowledged the difference between the considerations involved in determining a charging party's rights before the Board and the considerations described as dis-

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[17] Overlooked in the Union's collection of recent cases is *United Steelworkers of America v. N.L.R.B.*, 393 F.2d 661 (C.A.D.C.). There, the court considered and rejected a contention identical to that urged here, stating that the union's "strained efforts to use *International Union, United Automobile, etc. Workers v. Scofield*, 382 U.S. 205, to indicate a trend away from the court's earlier holding are unpersuasive."

positive of the question of appellate intervention. 382 U.S. at 219, n. 15.

To be sure, the Supreme Court in *Scofield* did reject the Board's argument that a successful charging party is an inappropriate party in review proceedings because of the distinction between "public" and "private" interests. But the Supreme Court's rejection of this argument leaves the *Frito Co.* analysis intact. Rhetoric about public and private rights was not the basis for this decision. It was the decision of Congress to commit final discretion in prosecuting complaints to the General Counsel that required rejection of the union's argument in *Frito Co.* in 1964, and that same legislative determination remains viable and dispositive today.

*Retail Clerks v. Food Employers Council, Inc.*, 351 F.2d 525 (C.A. 9), and *Leeds & Northrup Co. v. N.L.R.B.*, 357 F.2d 527 (C.A. 3), cited by the Union, are consistent with the Board's views here. In *Leeds & Northrup*, the court characterized the agency's decision to accept a settlement of an outstanding complaint as an act of adjudication, not prosecution, and thereby subject to review as final Board action. *Retail Clerks* similarly rests upon a determination that matters had passed the prosecuting stage and were therefore subject to determination by the adjudicating body—in that case, the district court under Section 10(*l*) of the Act. In the case at bar, the Union has failed to explain how allowing the complaint amendments it seeks can be viewed as anything but a reversal of the General Counsel's exercise of authority over the scope of the complaint. This, if anything, must be within the prosecutor's domain.

## CONCLUSION

For the reasons stated above, we respectfully submit that a decree should issue granting enforcement of the Board's order in No. 22,572, and denying the Union's petition for review in No. 22,572A.

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July 1968.

# APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

## RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

## UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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